

<b>Quito v PCS Mgt., LLC.</b>
2018 NY Slip Op 31942(U)
August 10, 2018
Supreme Court, New York County
Docket Number: 153131/2014
Judge: Kelly A. O'Neill Levy
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**KELLY O'NEILL LEVY  
JSC**

SUPREME COURT OF THE STATE OF NEW YORK  
COUNTY OF NEW YORK: IAS PART 19

-----X

JORGE QUITO,

Plaintiff,

- v -

PCS MANAGEMENT, LLC,

Defendant.

INDEX NO. 153131/2014

MOTION DATE 06/13/2018

MOTION SEQ. NO. 003, 004

**DECISION AND ORDER**

-----X

PCS MANAGEMENT, LLC,

Third-Party Plaintiff,

- v -

PAZZIA, LLC,

Third-Party Defendant.

-----X

The following e-filed documents, listed by NYSCEF document number (Motion 003) 126, 127, 128, 129, 130, 131, 132, 133, 134, 135, 136, 137, 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150, 151, 185, 187, 189, 191, 198, 200, 201, 204, 206, 207, 212, 213, 214, 215, 219, 221, 222, 223

were read on this motion to/for SUMMARY JUDGMENT

The following e-filed documents, listed by NYSCEF document number (Motion 004) 152, 153, 154, 155, 156, 157, 158, 159, 160, 161, 162, 163, 164, 165, 166, 167, 168, 169, 170, 171, 172, 173, 174, 175, 186, 190, 192, 199, 202, 203, 205, 208, 209, 210, 211, 216, 217, 218, 220

were read on this motion to/for DISMISS

HON. KELLY O'NEILL LEVY:

Motion sequence numbers 003 and 004 are hereby consolidated for disposition.

This is a personal injury action arising from a slip and fall accident.

Defendant/Third-Party Plaintiff PCS Management, LLC (hereinafter, PCS) moves (mot. seq. 003) for an order: (1) pursuant to CPLR § 3211(a)(5), dismissing the complaint based on a collateral estoppel defense, (2) pursuant to CPLR § 3212, granting summary judgment in its

favor as an out of possession landlord, and (3) granting conditional common law and contractual indemnity against Third-Party Defendant Pazzia, LLC (hereinafter, Pazzia). Plaintiff Jorge Quito opposes.

Pazzia moves (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint and third-party complaint in their entirety.

PCS opposes.

### BACKGROUND

On April 25, 2011, plaintiff was involved in an accident at Pazzia Restaurant, located at 1574 2<sup>nd</sup> Avenue in Manhattan (hereinafter, the restaurant). At the time of the accident, plaintiff had worked for Pazzia for more than two years as a pizza and pasta cook. The restaurant was operated by Pazzia. Pazzia leased the restaurant from PCS, the owner of the building [Cynthia Shakos tr. (ex. P to the McSpedon aff.) at 11].

The restaurant had a lower level that was used by Pazzia's workers as a preparation and storage area for the pasta, pizza, meat, and seafood. The lower level also contained a safe, a computer, and a locker area for workers to change in and out of their work clothes. There was a single staircase located in the back of the restaurant that was used to access the lower level. The staircase had approximately 13 steps made of diamond steel plating and it was the sole means used by workers to reach the lower level. On the date of the accident, there were no handrails on this staircase [Cazares tr. (ex. D to the Kleeger aff.) at 21]. Since the date of the accident, handrails were installed [*id.* at 24-25; Cecilio tr. (ex. F to the Kleeger aff.) at 13-14].

Plaintiff testified that the accident occurred at approximately 11:00 p.m., while he was working at the restaurant. He proceeded to the basement to change his clothing at the end of the work day [Plaintiff tr. (ex. H to the Kleeger aff.) at 94]. He stepped down one step and fell down

the stairs thereby injuring himself (*id.* at 102-103, 111). Plaintiff testified that he did not know why he slipped or tripped down the staircase (*id.* at 110). He admitted that, beginning at 10:00 p.m. on the subject date, he drank three to four glasses of vodka mixed with coke and he did not know how much vodka was in each glass (*id.* at 87, 89-91). Plaintiff asserts that he had tried to reach for a handrail but there was none, and that he does not know how he started to fall [Plaintiff Affidavit (ex. A to the Kleeger aff.) at ¶ 6].

Plaintiff filed a claim for workers' compensation benefits, but benefits were denied because the Workers' Compensation Board found that intoxication was the sole cause of plaintiff's accident. On May 22, 2012, plaintiff testified before the Workers' Compensation Board, where the issue of his drinking on the job was addressed. At the hearing, plaintiff testified that he had no idea how he fell. The Workers' Compensation Board decision stated that plaintiff was intoxicated at the time of the accident with a blood alcohol level of 0.371% [Workers' Compensation Board Decision (ex. B to the McSpedon aff.) at 1-2]. Dr. Brian Pape, a toxicologist retained by PCS, determined based on his review of the NY-Presbyterian Hospital record that plaintiff consumed an amount of alcohol equivalent to more than 22 ounces of 80-proof vodka, which equates to a 0.35% blood alcohol concentration [Affidavit of Dr. Brian Pape (ex. M to the McSpedon aff.)]. The lowest reasonable blood alcohol concentration at the time of plaintiff's accident was between 0.30% and 0.35% (*id.*). Scientific studies concerning the risk of falling reveal that a person with a blood alcohol concentration of more than 0.16% is at a 60 times greater risk of falling than a person in an alcohol-free state (*id.*). Dr. Pape concluded that plaintiff was physically and behaviorally impaired by alcohol when he fell, that he was at a substantially increased risk of falling, and that it would be reasonable to conclude that his alcohol-related impairments caused his fall (*id.*). Dr. Daniel Feuer, a neurologist retained by

Pazzia, testified that plaintiff was in an impaired and intoxicated state at the time of his fall and the intoxicated state was the competent producing cause of his fall [Dr. Daniel Feuer tr. (ex. F to the McSpedon aff.) at 8]. Dr. Feuer attested that even if there were any mechanical issues with the staircase, the severity of plaintiff's injury was so great such that it could only be accounted for by his intoxication and not having full control of his reflexes, coordination, and motor skills (*id.* at 9-10).

## DISCUSSION

### *Motion to Dismiss*

PCS moves, pursuant to CPLR § 3211(a)(5), for an order dismissing the complaint based on a collateral estoppel defense. Collateral estoppel bars re-litigation of an issue “which has necessarily been decided in [a] prior action and is decisive of the present action” if there has been “a full and fair opportunity to contest the decision now said to be controlling.” *Buechel v. Bain*, 97 N.Y.2d 295, 303–304 (2001). “The quasi-judicial determinations of administrative agencies are entitled to collateral estoppel effect where the issue a party seeks to preclude in a subsequent civil action is identical to the material issue that was necessarily decided by the administrative tribunal, and there was a full and fair opportunity to litigate before that tribunal.” *Auqui v. Seven Thirty One Ltd. Partnership*, 22 N.Y.3d 246, 255 (2013). “Whether collateral estoppel should be applied in a case turns on general notions of fairness involving a practical inquiry into the realities of the litigation.” *Id.* (internal citation omitted). “[A]mong the factors bearing on whether an administrative decision is quasi-judicial are whether the procedures used in the administrative proceedings were sufficient both quantitatively and qualitatively, so as to permit confidence that the facts asserted were adequately tested, and that the issue was fully

aired.” *Id.* (internal citation omitted). The party seeking to invoke collateral estoppel bears the burden of establishing identity of issue. *Id.*

PCS asserts that the November 6, 2013 decision of the Workers’ Compensation Board bars the present action. Plaintiff contends that the issue of causation was not fully developed by the Workers’ Compensation Board; the proof required for an intoxication defense is different in an administrative proceeding than a third-party litigation; the Workers’ Compensation Board did not have a full and complete record of witness testimony, code violations and expert engineer findings; and the Workers’ Compensation Board order is a conclusion of law or at least a mixed question of law and fact that is not binding on this court.

The court finds that the procedures, facts, and record relied upon by the Workers’ Compensation Board in making its decision were not quantitatively and qualitatively the same as presented herein to fully consider the issue at bar. The record in the present action includes more complete testimony, with questions posed to plaintiff regarding how the accident occurred and the events leading up to the accident, as well as a toxicology report by Dr. Brian Pape. Moreover, the Workers’ Compensation Board found that there was a dispute as to the existence of handrails at the time of the accident. The court finds that based on plaintiff’s testimony, as well as the deposition testimonies of Arturo Cazares, a dishwasher at the restaurant; and Santiago Cecilio, a cook at the restaurant, there was no handrail on the subject staircase at the time of the accident and that a handrail was later installed on the staircase, which explains the discrepancy in the various photographs depicting the staircase. Also, the workers’ compensation hearing was conducted under a different standard of proof and with the sole purpose of determining whether plaintiff was entitled to workers’ compensation benefits. In fairness to plaintiff, the court will not give collateral estoppel effect to the Workers’ Compensation Board’s decision, as the present

record is more quantitatively and qualitatively complete and the procedures used at the Workers' Compensation hearing differ from those used in the present litigation. Therefore, the court denies the branch of PCS's motion, pursuant to CPLR § 3211(a)(5), for an order dismissing the complaint based on a collateral estoppel defense.

#### *Summary Judgment Motions*

PCS moves, pursuant to CPLR § 3212, for an order granting summary judgment in its favor as an out of possession landlord. Pazzia also moves, pursuant to CPLR § 3212, for an order granting summary judgment in its favor and dismissing the complaint and third-party complaint in their entirety.

On a summary judgment motion, the moving party has the burden of offering sufficient evidence to make a prima facie showing that there is no triable material issue of fact. *Jacobsen v. N.Y. City Health & Hosps. Corp.*, 22 N.Y.3d 824, 833 (2014). Once the movant makes that showing, the burden shifts to the non-moving party to establish, through evidentiary proof in admissible form, that material factual issues exist. *Zuckerman v. City of New York*, 49 N.Y.2d 557, 562 (1980). In determining a motion for summary judgment, the court must view the evidence in the light most favorable to the non-moving party. *Henderson v. City of New York*, 178 A.D.2d 129, 130 (1st Dep't 1997). The court's function on a motion for summary judgment is issue-finding, rather than making credibility determinations or factual findings. *Vega v. Restani Constr. Corp.*, 18 N.Y.3d 499, 505 (2012).

PCS asserts that it was an out of possession landlord that relinquished control of the demised premises, that it was not obligated under the lease to repair or maintain the premises, and that there was no specific statutory violation as a matter of law. PCS also asserts that there is no duty to have a handrail installed on the staircase in question. Pazzia submits that there are no

relevant issues of fact precluding summary judgment. Plaintiff asserts that PCS was negligent in failing to install a handrail on the subject staircase and that PCS violated the building code by not installing handrails.

In *McNally v. Sabban*, the plaintiff was injured when he was highly intoxicated and apparently fell down the common stairway of a residential building. *McNally v. Sabban*, 32 A.D.3d 340, 340-341 (1st Dep't 2006). The plaintiff alleged numerous building code violations in the stairway, including lack of handrails. *Id.* at 341. The court held that there was no evidence that the alleged code violations caused the plaintiff's fall, and thus, there was no triable issue as to causation. *Id.* at 342. The court found that the plaintiff's testimony that he had no recollection of how the accident occurred was sufficient to find for the defendants as a matter of law, and that even if an expert alludes to potential defects on a stairway, the plaintiff still must establish that the slip and fall was connected to the supposed defect. *Id.*; *Kane v. Estia Greek Rest., Inc.*, 4 A.D.3d 189, 190 (1st Dep't 2004); *Birman v. Birman*, 8 A.D.3d 219, 219-220 (2d Dep't 2004). In *McNally*, the court also found that the plaintiff's intoxication may well be the principal cause of his harm and thus rendered the alleged defects of the stairway too remote to constitute a proximate cause of his injuries. *McNally*, 32 A.D.3d at 342. In *Birman v. Birman*, the court held that the plaintiff's failure to establish the cause of her fall was fatal to her case and that the defendants demonstrated their prima facie entitlement to judgment as a matter of law through the plaintiff's deposition testimony that she was unable to identify the cause of her accident. *Birman*, 8 A.D.3d at 219. In *Birman*, the plaintiff alleged that she would not have fallen had the staircase been equipped with handrails, but the court found that the plaintiff failed to present any evidence connecting any allegedly unsafe condition to her fall. *Id.* at 220.

“[W]here the facts proven show that there are several possible causes of an injury, for one or more of which the defendant was not responsible, and it is just as reasonable and probable that the injury was the result of one cause as the other, plaintiff cannot have a recovery, since he has failed to prove that the negligence of the defendant caused the injury.” *Ingersoll v. Liberty Bank of Buffalo*, 278 N.Y. 1, 7 (1938); *McNally*, 32 A.D.3d at 341; *Lynn v. Lynn*, 216 A.D.2d 194, 195 (1995). In *Kane v. Estia Greek Rest., Inc.*, a similar case where the plaintiff was intoxicated, fell down a staircase, and remembered very little about the accident, the court granted summary judgment to the defendant on the basis that absent an explanation of the accident, the verdict would rest only on speculation. *Kane*, 4 A.D.3d at 190. It is ultimately plaintiff’s burden to prove that the defendant’s negligence caused plaintiff’s injuries. *McNally*, 32 A.D.3d at 341.

In this case, the evidence is uncontroverted that plaintiff was severely intoxicated when he fell down the staircase at the restaurant. The Workers’ Compensation Board decision stated that plaintiff had a blood alcohol level of 0.371% at the time of the accident [Workers’ Compensation Board Decision at 1-2]. The lowest reasonable blood alcohol concentration at the time of plaintiff’s accident was between 0.30% and 0.35% [Affidavit of Dr. Brian Pape]. Plaintiff was physically and behaviorally impaired by alcohol when he fell, he was at a substantially increased risk of falling, and it would be reasonable to conclude that his alcohol-related impairments caused his fall (*id.*). Dr. Daniel Feuer testified that a non-alcoholic with plaintiff’s blood alcohol level would certainly have been unconscious (Dr. Daniel Feuer tr. at 15). Plaintiff testified that he did not know how or why he slipped or tripped down the staircase (Plaintiff tr. at 110). Plaintiff contends that he had tried to reach for a handrail but there was none [Plaintiff Affidavit at ¶ 6]. The court finds that the notion that plaintiff tried to reach for a handrail is pure speculation, as plaintiff was severely intoxicated at the time and did not know

why he fell, and as such does not create an issue of fact as to the cause of plaintiff's injuries. Like *McNally*, *Birman*, and *Kane*, in this case the plaintiff was intoxicated, he fell down a staircase, and does not remember why he fell. Similarly, here, plaintiff has failed to prove that any defect in the staircase or lack of a handrail was the proximate cause of his accident, other than the speculation that he had reached out for a handrail. Plaintiff's repeated assertions that he is unable to state the cause of his fall is sufficient to find for PCS and Pazzia as a matter of law. Plaintiff's severe intoxication was the principal and sole proximate cause of his accident and renders the alleged defects in the staircase too remote to constitute a proximate cause of his injuries, and thus, in the absence of any triable material issue of fact, the court grants Pazzia and the branch of PCS's respective motions for summary judgment, dismissing the action as well as the third-party action in their entirety.

#### *Indemnity*

PCS moves for an order granting it conditional common law and contractual indemnity against Pazzia. This branch of PCS's motion is denied as moot, given that the court has granted PCS and Pazzia's respective motions for summary judgment above.

The court has considered the remainder of the arguments and finds them to be without merit.

### **CONCLUSION AND ORDER**

For the foregoing reasons, it is hereby

**ORDERED** that the branch of Defendant/Third-Party Plaintiff PCS Management, LLC's motion (mot. seq. 003) for an order, pursuant to CPLR § 3211(a)(5), dismissing the complaint based on a collateral estoppel defense is denied; and it is further

**ORDERED** that the branch of Defendant/Third-Party Plaintiff PCS Management, LLC's motion (mot. seq. 003) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor is granted; and it is further

**ORDERED** that the branch of Defendant/Third-Party Plaintiff PCS Management, LLC's motion (mot. seq. 003) for an order granting conditional common law and contractual indemnity against Third-Party Defendant Pazzia, LLC is denied as moot; and it is further

**ORDERED** that Pazzia, LLC's motion (mot. seq. 004) for an order, pursuant to CPLR § 3212, granting summary judgment in its favor and dismissing the complaint and third-party complaint in their entirety is granted; and it is further

**ORDERED** that the complaint and third-party complaint are dismissed against all parties.

The Clerk is directed to enter judgment accordingly.

This constitutes the decision and order of the court.

8-10-18  
DATE

Kelly O'Neill Levy  
KELLY O'NEILL LEVY, J.S.C.  
**KELLY O'NEILL LEVY**  
JSC

CHECK ONE:

CASE DISPOSED

GRANTED

SETTLE ORDER

INCLUDES TRANSFER/REASSIGN

DENIED

NON-FINAL DISPOSITION

GRANTED IN PART

SUBMIT ORDER

FIDUCIARY APPOINTMENT

OTHER

REFERENCE

APPLICATION:

CHECK IF APPROPRIATE: